Petition

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NO. 81-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DONALD WAYNE STOUTH,

PETITIONER,

V.

STATE OF TENNESSEE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF TENNESSEE

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QUESTIONS PRESENTED

1. Whether several sections of T.C.A. 39-2404 violate constitutional protections established by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution:

a). relying on T.C.A. 39-2404(c) the trial Court allowed evidence that permitted unguided and unrestrained discretion regarding the imposition of the death penalty by the jury;

b). T.C.A. 39-2404(g) creates an impermissible presumption of death if one or more aggravating circumstances are proved, creating an unlawful shift in the burden of proof to the Defendant;

c). T.C.A. 39-2404(g) makes death mandatory under certain conditions and does not allow the jury the opportunity to show mercy;

d). T.C.A. 39-2404(i)(5) is unconstitutionally vague and overbroad;

2. Whether the admission of evidence which had been requested by petitioner but which had not been made available to him undermined the fairness and reliability of the fact finding process at the guilt stage of the proceedings thereby violating the petitioner's rights under the Eighth and Fourteenth Amendments.

3. Whether the refusal of the trial Court to admit into evidence testimony relevant to the deterrent effect of capital punishment and relative to Christian philosophy on death as punishment deprived the jury of facts relevant to the issue of life or death in the punishment phase in violation of the petitioner's rights under Eighth and Fourteenth Amendments.

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THE STATE OF TENNESSEE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

Petitioner Donald Wayne Strouth respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Tennessee.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Tennessee are reported at 620 S.W.2d 467 and are attached here as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on June 8, 1981. A timely petition to rehear was denied on August 31, 1981. On October 14, 1981, Justice O'Connor granted petitioner's motion to extend the time to file this petition. This court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3), petitioner having asserted below and is asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person shall be held to answer for a capital crime....nor be deprived of life, liberty,...

without due process of law."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be imposed, nor cruel and unusual punishment inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N] or shall any state deprive any person of life, liberty or property, without due process of law...."

2. This case also involves the Tennessee statute which provides for possible death penalty on conviction of murder in first degree. The statute is codified in T.C.A. 39-2404, a copy of which is attached as Appendix B.

STATEMENT OF THE CASE

On May 2, 1978, Petitioner was charged by the Grand Jury of Sullivan County with armed robbery and with the murder of James Keegan during the course of that armed robbery on February 15, 1978.

Petitioner's trial before a jury was commenced on August 28, 1978. On September 1, 1978, he was found guilty of first degree murder and armed robbery, receiving a sentence of 40 years on the robbery conviction. On September 2, 1978, the sentencing phase of the trial began with respect to the first degree murder conviction. On September 4, 1978, the jury returned its verdict of death by electrocution.

Robert Moore testified that he was a detective sergeant with the Kingsport Police Department involved in the investigation of the death of Jimmy Keegan; that Keegan died at the Budget Shop located at 333 Sullivan Street in the Five Points area of Kingsport, Tennessee; that he understood there was no blood sample taken from the victim; and that it was department policy that color photographs be taken in all murder investigations.

Charles T. Williams testified that on February 15, 1978, he was a detective with the Kingsport Police Department; that when he arrived at the Budget Shop that day he found the body of James Keegan lying on the floor with lacerations on the right side and top of the head and a large laceration across the throat; that as a result of his investigation, he had a composite drawing made of the suspect, but that it did not describe Petitioner.

Dr. James E. Wilford Testified that the wound to Keegan's head would have caused unconsciousness and the wound to the neck caused death within 15 minutes; that the smoothness of the cut would indicate that there was not a great deal of struggle when inflicted and that he arrived at his opinion regarding death in the case before he ever saw any photographs; that he came to the conclusion that the neck wound was inflicted while the victim was unconscious without the photographs; that the victim was unconscious when the neck wound was inflicted; that he could not say that the pattern of blood spots on Petitioner's jeans came from someone standing over the victim and cutting his neck.

The jury returned a verdict of guilty on the charge of armed robbery with a sentence of 40 years and a verdict of guilty on the first degree murder charge.

The sentencing phase of the trial regarding the murder conviction began on Saturday, September 2, 1978. Sergeant Benjamin C. Weldon testified that he was a detective with the Cumberland County Sheriff's Department in Fayetteville, North Carolina, that in September, 1975, he prosecuted Petitioner for a crime against nature for which he received a sentence of two years. Out of the presence of the jury the Court then heard Petitioner's arguments that the certified copy of the conviction had not been supplied to him as requested by the Bill of Particulars and as directed by the Court. Respondent offered to the Court certified copies of three juvenile convictions and Petitioner argued that these were not supplied to him. Respondent argued that it was not limited to proving statutory aggravating circumstances but could go into any facet of Petitioner's background, without notice to him with which position the trial court agreed.

After the jury returned to the Courtroom, Respondent introduced certified copies of the Court records from Cumberland County, North Carolina showing the conviction for a crime against nature. Weldon's records reflected that Petitioner's birthday was January 9, 1959; that the date of the offense was September 4, 1975, indicating that he was 16 years of age.

Sam Daniels testified that he was a detective with the Elizabethton Police Department; that on October 16, 1977, he participated in an investigation of a theft of a mini-bike which led to the arrest of Petitioner for grand larceny; that when arrested, Petitioner had a set of brass knuckles and a pocket knife; and that he was convicted of carrying a dangerous weapon (knuckles) and secreting stolen property.

Out of the presence of the jury, Petitioner asked which aggravating circumstance Respondent was trying to prove with Daniels' testimony to which the Court, and not Respondent, replied that the testimony would be relevant to the second part of circumstance No. 5 relating to depravity of mind and the issue of character.

Officer Little testified that he was involved with Officer Daniels in the investigation, that Petitioner told him that he would kill Officer Daniels and that he had had a gun in his hand since he was 12 years old.

Jeffery McMahan testified that he had known Petitioner for one year; that Petitioner was in prison with his brother; that when he first met Petitioner, he was told by him that he had robbed a few stores and the only way he did it was to leave an empty cash register and dead bodies.

Respondent introduced certified copies of three juvenile petitions filed against Petitioner in Maryland.

Dr. Shannon Jung was called by Petitioner and testified that he lived in Bristol, Tennessee; that he was a minister and taught sociology and religion at Virginia Intermont College. The Court sustained Respondent's objection and forbid any testimony regarding the Christian philosophy of death as punishment for crime on the ground that it had no probative value on the issue of punishment.

Petitioner then offered Dr. Jung's testimony for the record. He testified that he had baccalureate degree from Washington and Lee University in Lexington, Virginia, that he received ministerial training at Union Theological Seminary in Richmond, Virginia, that he received a master's degree from Yale Divinity School and has a Ph.D. in Sociology from Vanderbilt University. He taught sociology, social problems, marriage and family, urban sociology, social and cultural change and religion and ethics. He said that he found the scripture to be the most reliable guide as to the Christian position of death as punishment and then outlined the Christian philosophy on death as punishment for crime. He stated that as a sociologist he was familiar with the issue of death as punishment for a crime; that in his studies he had become familiar with the writings and studies done regarding the deterrent effect of death as punishment for crime; that he was familiar with the work of the leading authorities in the area and used their material in classes that he taught; that in various courses that he taught he considered the questions of deterrence and the value of punishment. He stated there had been extensive studies done on deterrence; that he has researched

those studies but has not yet published any papers regarding them. He outlined the studies, their findings and his conclusion that the death penalty has no deterrent effect on crime. The trial judge then ruled that Dr. Jung was not qualified in the area of sociological studies regarding capital punishment.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's first ground for error in the Tennessee Supreme Court asserted that the Court allowed in evidence that permitted unguided and unrestrained discretion regarding the imposition of the death penalty. The Tennessee Court rejected this position without a discussion of the facts. 620 S.W.2d at 470.

2. Petitioner argued that T.C.A. 39-2404(g) creates a presumption of death if one or more aggravating circumstances are proved, creating an unlawful shift in the burden of proof from the state to the Defendant. The Tennessee Court ignored this claim.

3. Petitioner argued that T.C.A. 39-2404(g) as applied, makes death mandatory under certain circumstances and does not allow for the jury to show mercy. The Tennessee Court ignored this claim.

4. Petitioner further argued that T.C.A. 39-2404(i)(5) is unconstitutionally vague and overbroad. The Tennessee Court ignored this claim.

5. Finally, the Petitioner argued that the trial court erroneously admitted evidence which had been requested by appellant but which had not been delivered to him. Petitioner argued that he had requested discovery relating to proof the state intended to put on at the second stage and that a certified conviction of a North Carolina crime and also information regarding Petitioner's juvenile record had not been proffered. The Court held since Defendant was supplied with a copy of an F.B.I. rap sheet that this was sufficient. Further, the Court said that the District Attorney had just received the Maryland documents at the time of trial. No inquiry was made by the Court as to why the District Attorney did not have them earlier.

6. During the punishment phase of the trial, Appellant offered evidence relating to the deterrent effect of the death penalty and to the Christian Philosophy towards death as punishment. The trial judge

did not allow this evidence to be presented before the Jury. The Tennessee Supreme Court upheld that decision, holding that such evidence was irrelevant because it had no bearing on the Defendant's character, his prior record or the circumstances of his offense.

REASONS FOR GRANTING THE WRIT

I. T.C.A. 39-2404 ON ITS FACE AND AS APPLIED HERE VIOLATES THE CONSTITUTIONAL PROTECTION ESTABLISHED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The trial court allowed in evidence permitting unguided and unrestrained discretion regarding imposition of the death penalty.

T.C.A. 39-2404 (c) allows Respondent to put on unlimited evidence regarding the nature and circumstances of the crime, the defendant's character, background, history, and physical condition. Respondent should be limited to that proof necessary to prove beyond a reasonable doubt the existence of one or more of the enumerated aggravating circumstances. To allow Respondent to put on evidence regarding these matters brings us full circle to the situation prohibited by the U.S. Supreme Court in Furman v. Georgia 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) where the jury is permitted unguided and unrestrained discretion regarding the imposition of the death penalty in a particular case. In Furman the Supreme Court concluded that sentencing without legislatively defined standards violates the Eighth Amendment because it is "pregnant with discrimination," Furman, at 257, and because it permits the death penalty to be "wantonly" and "freakishly" imposed, id, at 310.

In an attempt to comply with the mandate of legislatively defined standards, several states have introduced the idea of a bifurcated trial at which a jury would have to decide life or death based on specifically enumerated aggravating circumstances. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh. den. 429 U.S. 875 (1976). See also T.C.A. 39-2404(i)(1-11).

Respondent should be limited to proof that is directly relevant to any of the enumerated aggravating circumstances, while a defendant

should be allowed the opportunity to put on any evidence that he or she considers a mitigating factor.

In Lockett v. Ohio, U.S. ____, 98 S.Ct. 2954, 57 L.Ed.973, 46 U.S.L.W. 4981 (1978), the Court concluded,

> "That the Eighth and Fourteenth Amendments require that the sentencer in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor (Court's emphasis), any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers (emphasis our) as a basis for a sentence less than death." 98 S.Ct. at 2965.

A statute such as T.C.A. 39-2404(c) which allows introduction of "any evidence" is constitutionally infirm. What possible relevance could the testimony of the police officers, who once arrested Petitioner, about threats he made to them, have on the sentence? (R.E. 1369, p. 1373) Did the testimony of a friend about statements made to him by Petitioner a year prior to the incident here have relevance to the sentence? (R.E. pp. 1380-1381) Does the statute, which allows this type of evidence to be admitted, prevent unguided and unrestrained discretion regarding the imposition of the death penalty? The answer to these questions must be in the negative. The result of such testimony is prejudicial to Petitioner in that it makes the jury want to kill him for a number of reasons unrelated to any pattern of legislatively defined standards.

T.C.A. 39-2404(c) allows testimony such as that given by the two officers and by his friend from North Carolina, "...provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted." What "fair opportunity" did Petitioner have to rebut these statements? He would have had to waive his right to remain silent and open himself up to cross-examination to rebut or answer such charges. In balance the prejudice totally outweighs any relevance.

The same holds true for the introduction of documents indicating that Petitioner had been convicted of a felony, even though the record is barren of any testimony that this felony was committed with violence or the threat of violence. An even further outrage is the introduction of misdemeanor conviction and juvenile petitions. Introduction of this

type of information is totally prejudicial. Upon objection by Petitioner, the Court replied that, "I will instruct the jury specifically that they must find one (1) or more of the listed aggravating circumstances." (B.E. 1358) If this be the case and the jury must find the aggravating circumstances, then what possible reason or purpose is served by admitting seriously prejudicial evidence that can in no way be used to prove any of the statutory aggravating circumstances?

Later the Court, in attempting to justify admitting this prejudicial testimony, said it did so to allow Respondent to rebut any mitigating circumstances. (B.E. 1358) Petitioner made no attempt to prove nor did he argue that he had no significant history of prior criminal activity and any rebuttal that Respondent had, could and should have been withheld until an attempt was made by Petitioner to avail himself of this point in mitigation. This procedure could possible have remedied the prejudice.

Respondent relied on State v. Mackey, 553 S.W.2d 337 (1977), for support of this section of the statute. This reliance is misplaced; Mackey is not applicable to the facts in this case. There are several points that make this case distinguishable: First, Mackey applies to cases in which the sentencing authority has discretion in sentencing, so as the sentencer will "be able to exercise his discretion intelligently and pronounce a just sentence." Cason v. State, 160 Tenn. 276, 23 S.W.2d 665, (1930). Under T.C.A. 39-2401 et. seq. the sentencer has no discretion. Secondly, the punishment here is death, not a term of years in some penitentiary. Death cases are different, Lockett v. Ohio (supra); Williams v. Georgia, 349 U.S. 375, 99 L.Ed. 1161, 75 S.Ct. 814 (1955); Stein v. New York, 346 U.S. 156, 97 L.Ed.2d 1522, 73 S.Ct. 1077 (1953); T.C.A. 39-2401 et seq. (Bifurcated trial).

Mackey (supra) applies to discretionary sentencing with its basis being the idea that certain public policy considerations can be adequately carried out. But as mentioned about the Furman Court rejected unbridled jury discretion in death cases, such as that allowed here.

Since, Gregg (supra), the Court has set out a narrow path that must be followed if this State intends to kill people as a criminal sanction. On the one hand there must be legislatively defined standards for the sentencer to follow. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960, reh. den. 429 U.S. 875 (1976). This devise is intended to limit the discretion of the sentencer to those issues found by the legislature to be relevant to the sentence.

On the other hand the Court has ruled that no discretion (for example, mandatory death for certain crimes) is equally violative of the Constitution. Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976). The reason the mandatory statutes could not withstand the constitutional review was because of the "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson (supra at 304).

The reason that the Court agreed with the Georgia and Florida statute was that they travelled the narrow path without leaving it. The "particularized consideration of relevant facts of the character and record of each convicted defendant" are set out in the statutorily enumerated aggravating factors. The reviewing Court can then determine that the juries in a particular state are looking at the same "relevant facts" and not "any evidence" that Respondent argues for under the Mackey case.

The sentencer in Tennessee does not have the discretion discussed in Mackey (supra). If they find certain things present, "the sentence shall be death." T.C.A. 39-2404(g). The statute in question is a good example of the confusion that the legislature went through in trying to meet the Court's mandate. This statute travels the same path as other states have trod but the Tennessee statute goes over the side lines on both sides, by allowing unbridled discretion and making death a "shall" rather than a "may".

The Supreme Court of the United States has made it clear that the advocates of death be restricted to offering evidence that proves, beyond a reasonable doubt one or more of the enumerated aggravating

circumstances but allows the advocates of life to put on any evidence that might convince a jury that they should not kill.

The procedure used hereto gain a conviction and sentence of death was "pregnant with discrimination" and if allowed to stand will permit the death penalty to be "wantonly and freakishly" imposed in Tennessee.

B. T.C.A. 39-2404(g) creates the presumption of death if one or more aggravating circumstances are proved, creating an unlawful shift in the burden of proof to the defendant.

T.C.A 39-2404(g), as applied here allows for the creation of a presumption of death upon a finding at the guilt stage that the Petitioner committed murder while carrying out an armed robbery. It should be noted here that Petitioner was found guilty of Murder in the First Degree during the commission of a robbery. The jury found that the state had met its' burden and proved beyond a reasonable doubt that he committed a murder during the course of an armed robbery. At this point in time there is already a finding by the jury that the state had proved one of the aggravating circumstances, therefore the burden shifted to Petitioner to put on proof that he should be given a life instead of death. In other words, upon conviction the jury must necessarily conclude that the prosecution has met its burden of proof with regard to the presumed fact that the necessity of death has been established by other facts. This is impermissible. "'The penalty of death is qualitatively different' from any other sentence." Lockett v. Ohio (supra). The only constitutionally permissible presumption must be life.

Generally in a criminal case the prosecution bears both the production burden and the persuasion burden. (Citation omitted). Since this procedural device T.C.A. 39-2404(g) shifts the production burden to the defendant, these devices must satisfy certain due process requirements, which upon examination, they do not. See Barnes v. U.S., 412 U.S. 837 (p. 846 note 11); 93 S.Ct. 2357 (2363); Turner v. U.S., 396 U.S. 398, 90 S.Ct. 642 (1970).

This shift of the burden violates the Due Process Clause as described in Mullaney v. Wilbur, 421 U.S. 684 95 S.Ct. 1881 (1975); In Re: Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068; Pattterson v. New York, 432 U.S. 210, 97 S.Ct. 2319, 53 L.Ed2d 281.

In Mullaney, (supra), the statute required a defendant charged with murder, which upon conviction carried a mandatory sentence of life impr. sonment, to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter which carried a lesser sentence. The Court held that this scheme does not comport with the requirement of the Due Process Clause of the Fourteenth Amendment and that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

The Mullaney Court made it clear that the Winship ruling was not limited to only those facts that constitute a crime as defined by state law, but also factors that bear solely on the extent of punishment. The Court used the Maine statute as an "extreme example" of an unlawful shift in the burden of proof. Petitioner should not as he was here be required to come forward to prove a lesser penalty. In relying on Winship, the Court said,

> "Winship is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the state'..., and to the interests of both the State and the defendant as affected by the allocation of the burden of proof."

This position was reiterated in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed2d 39 (1979). Sandstrom was charged with homicide in that the "purposely and knowlingly" caused to death of the victim. The jury was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts."

Citing Mullaney,

> "A presumption which, although not conclusive had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmative. If Sandstrom's jury interpreted the presumption in that manner, it could have concluded that upon

> proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lashed the requisite mental state. Such a presumption was found to be constitutionally deficient--Mullaney v. Wilbur.." 442 U.S. at 524.

The Strouth jury found guilty of murder robbery. Accordingly to the statute, which formed the basis for the institution, there was an automatic finding of death, which like the sentence - Mullaney required on impermissible shift - the burden of persuasion to the Defendant who must put forth evidence of mitigation that outweighs the aggravating circumstances. The state would not have even had to put on proof in the second stage. With the conviction of robbery-murder one of the aggravating circumstances had been proved beyond a reasonable doubt and the presumption (if the aggravating circumstances are not "outweighed by the mitigating that the presumption" shall be death) if death attaches. The burden of persuasion shifts to Defendant to prove that he should have a lesser sentence.

This is an impermissable shift and the Court should step in to protect the rights of Petitioner to due process of law.

C. T.C.A. 39-2404(g) Makes death mandatory under certain conditions and does not allow the jury the opportunity to show mercy:

Section (g) of T.C.A. 39-2404 makes death mandatory upon certain conditions. This provision violates the due process clause in that it does not allow the jury to show mercy. The Supreme Court made it clear in Gregg v. Georgia (supra), at p. 199, that,

> "Nothing in any of our cases suggests that the decision to afford an individual mercy violates the constitution."

Later, in Lockett v. Ohio, (supra), the Court said,

> "The need for treating each defendant in a capital case with the uniqueness of the individual is far more important than in non-capital cases."

A penalty of death" calls for a greater degree of reliability."

Lockett supra p. 2964.

The failure or refusal of this legislative enactment to allow for mercy, which is constitutionally permissible (see Gregg at p. 199), makes it violative of the Due Process Clause in that it does not afford the necessary due process due in a death case. Roberts v. La. 428 U.S. 325, 49 L.Ed. 2d 974, 96 S.Ct. 3001, reh. den. 429 U.S. 890; Woodson v. N.C. (supra).

In Gregg, (supra), the Court spent a good deal of time with the history of the phrase "cruel and unusual punishment", tracing it from 1689 up to the present. Initially the prohibition was confined to the methods used but as time went on the clause was expanded and "...may acquire meaning as public opinion becomes enlightened by a human justice." Weems v. U.S., 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910). For examples of this theory in practice see: Trop v. Dulles, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (denationalization of soldier for desertion); Robinson v. California, 370 U.S. 660, 8 L.Ed.2d 578, 82 S.Ct. 1417 (1962) (status of being addicted to heroin made criminal offense).

The Court concluded that "an assessment of conterporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment...this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." Gregg (supra) at p. 173.

Petitioner suggests that one very important method of objectively determining whether society is changing its attitude regarding death as punishment would be the refusal of juries to sentence to death, opting for imprisonment instead. See Woodson v. N.C. (supra). Mr. Justice Powell dissenting in Furman v. Ga., (supra) at p. 439, pointed out that

> "Any attempt to discern therefore, where prevailing standards of decency lie must take careful account of the jury's response to the question of capital punishment."

Petitioner here was charged with murder during the perpetration of a robbery. Automatically upon the findings of guilt at least one aggravating circumstances is established. (T.C.A. 39-2404(i)(7) making death mandatory). The statutory scheme being questioned here precludes

such a progressive response. The jury that finds certain aggravating circumstances "shall" sentence the defendant to death even if they believe that killing is wrong.

The lesson of the 1976 cases is that the jury must have some "guided" discretion in choosing the proper penalty. The boundary lines are narrow. Too much discretion, on the one hand, leads to the wanton and freakish imposition of the death penalty, (Furman), and no discretion in sentencing fails to take into account the "fundamental respect for humanity underlying the Eighth Amendment" Woodson, (supra).

The Court in refusing to give an instruction that allowed for mercy showed the inflexibility of the statute. (R.E. 1514 and 1522).

D. T.C.A 39-2404(i)(5) is unconstitutionally vague and overbroad.

This aggravating circumstance is void because of vagueness. It is axiomatic that "[w]here...there are no standards governing the exercise of discretion granted by (a statute), the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). Such scheme essentially "licenses the (trier of fact) to create its own standards in each case." Herndon v. Lowry, 301 U.S. 242, 263 (1937). See also Thornhill v. Alabama, 310 U.S. 88 (1940)

> "We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement...Statutory language of...standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standard of the criminal law." Smith v. Goguen, 415 U.S. 566, 574-575 (1974).

T.C.A. 39-2404(i)(5) constitutes just such an abdication. The phrase "especially heinous, atrocious or cruel" is so vague, amorphous and broad as to provide Tennessee juries and sentencing judges with no real standard for its application.

Where the sentencing statute gives no discretion to the jury this aggravating circumstance allows for unguided and unrestrained discretion in the hands of the jury.

Godfrey v. Georgia, 100 S.Ct. 1759 (1980) dealt with a portion of the Georgia death penalty law which provided that the death penalty could be imposed if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim." In that case, the Defendant had shot his wife and mother-in-law with a shotgun, killing each of them instantly. The jury imposed the death sentence on each murder conviction finding that the aggravating circumstance was that the offense was "outrageously or wantonly vile, horrible and inhuman."

In Godfrey this court reversed the death sentence finding that the construction of the statute by the Georgia Supreme Court and its application to the facts of the case was so broad and vague as to violate the 8th and 14th Amendments. The Court further held that in order to authorize capital punishment, a state must apply its law in a manner that avoids arbitrary and capricious imposition of the death penalty and must define the crime in a way that eliminates standardless sentencing discretion. The Court further found that those offenses did not reflect a "consciousness materially more depraved than that of any person guilty of murder."

In the present case, one of the aggravating circumstances found by the jury was that contained in T.C.A. 39-2404(i)(5), the language of which is similar to that of the Georgia statute dealt with in the Godfrey case. In this case, the victim was unconscious at the time he was killed and there was no proof of any torture of suffering. The applicable code section provides that the murder must involve torture and depravity of mind in order to be found especially heinous, atrocious or cruel. The proof in the present case did not support a finding that the murder involved torture or depravity of mind. Furthermore, the language is so vague and overbroad that arbitrary imposition of the death penalty cannot be avoided. The sentencer has no standard by which to judge whether the murder involves torture or depravity of mind and these terms were not defined for the sentencer. Without any standard by

which to judge Petitioner's conduct, the sentencer is allowed unguided and unrestrained discretion and with such a practice, arbitrary and capricious imposition of the death penalty cannot be avoided.

The Tennessee Supreme Court in its opinion on the petition to rehear held that it had consistently held that his aggravating circumstance involved acts unnecessarily tortuous or a depraved state of mind which met the test of heinous, atrocious or cruel. However, the cases cited by the Court to show its consistent holdings were all decided after the trial of this case. Thus at the time of the trial in this case there had been no judicial interpretation of this statutory section and thus no definition of it to be used by the jury in its determination.

II. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE WHICH HAD BEEN REQUESTED BUT NOT PRODUCED.

The State is obligated to furnish Petitioner upon request copies of previous convictions within Respondent's possession which are, or reasonably could become, known to the district attorney, which are intended for use at trial. Tenn. Rules of Criminal Procedure 16 (a)(1)(b).

In State v. Gaddis, 530 S.W.2d 64 (1975) the Tennessee Supreme Court noted,

> "... an emerging trend toward broad and reciprocal discovery in criminal cases. The days of trial by ambush are numbered" at 69.

Petitioner entered such a request, which the Court granted. (T.R. p. 24 lines 5-6). During the second stage hearing the prosecutor introduced a certified copy of Petitioners' North Carolina conviction for crime against nature, a copy of which had not been submitted to him. (B.E. 1350). The Court overruled Petitioner's objection, saying that the reference to that conviction within an F.B.I. report provided adequate notice to Petitioner's attorney, that the State would introduce copies of these convictions. (B.E. pp. 1351, 1357). The Supreme Court of Tennessee agreed. Rule 16 (a)(1)(b) provides that a copy of such a criminal conviction record shall be given to him. This rule is

patterned upon Federal Rule 16 (a)(1)(b), which is designed to resolve before trial any dispute as to the correctness of the charge, Advisory Committee Notes, U.S.C.S. Court Rules 436, at 440 (1978), and to prevent trial by ambush, U.S. v. Kelley 420 F.2d 26 (2d Cir. 1969).

To this end, the Rules should be liberally construed. U.S. v. Anderson 254 F.Supp. 177 (W.D. Ark. (1966). Federal Courts have admonished that the Rules be applied "with a spirit of cooperation among court and counsel" and encourage as desirable, compliance with informal discovery requests. U.S. v. Percevault, 490 F.2d 126 (2d Cir. 1974). Contrary to this spirit, the prosecutor sought to impede Petitioner by meeting his request for the item specifically provided for in Rule 16 (a)(1)(b) with a substitute item not containing the information necessary to prepare for trial. The State felt that it had met its obligation to provide Petitioner a copy of conviction papers in their possession by merely giving him an address where a copy can be found. Such conduct breaches the intent of the Rule, and should have led the Court to exclude all evidence not disclosed.

Petitioner further asserts that the prosecutor should have furnished him with copies of the three juvenile petitions introduced at the second stage hearings (B.E. p. 1351), for the reasons stated above. Although such records are not technically criminal records, it would be contrary to the spirit and letter of the rules to allow the prosecutor to use them as such without complying with the Rule 16 restrictions, particularly when one considers the protection traditionally given to juvenile records. The State did not furnish Petitioner with copies (B.E. p. 1352) or notice that such records might be used (B.E. pp. 1356,1357). These records were not listed on the F.B..I. report (B.E. p. 1356). As such, the use of these records constituted surprise of the greatest magnitude. The State knew that such documents were potential evidence when it contacted Maryland in advance of the trial to arrange for copies. At that time he should have honored his continuing duty to disclose under Rule 16 (c). Yet they declined to notify Petitioner to that effect, knowing that Petitioner would be unable to meet this evidence when it was placed before the jury. Under these circumstances, the only proper remedy would have been to exclude such evidence from use

pursuant to Rule 16 (d)(2), particularly after the state's failure to furnish this information to Petitioner, pursuant to his request was called to the attention of the Court by Petitioner. (B.E. pp. 1350-1360) and it became clear to the Court that Petitioner's counsel had not previously seen the materials offered as evidence by the State.

Petitioner's claim is, quite simply, that minimal due process requires that possession by the defense of information such as that requested is necessary to prepare both at stage I and stage II. The State here, ambushed Petitioner with these documents and in doing so violated the trial court's order and their promise to make available this information. There were but two remedies available to the trial judge and he refused to avail himself of either. First, he could have granted a continuance to allow the Petitioner time to prepare for his response which he refused and, second, he should have excluded the evidence entirely. Rule 16, T.R.Cr.P.

III. REFUSAL OF THE TRIAL COURT TO ALLOW INTO EVIDENCE SOCIOLOGICAL DATA ON THE DETERRENT EFFECT OF CAPITAL PUNISHMENT AND EVIDENCE ON THE CHRISTIAN PHILOSOPHY OF DEATH AS PUNISHMENT KEPT FROM THE JURY EVIDENCE RELEVANT TO THE ISSUE OF PUNISHMENT IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

T.C.A. 39-2404(j)(1981 Supp.) sets out statutory mitigating circumstances but provides that "the jury shall consider... any mitigating circumstances which shall include, but not be limited to" the statutory circumstances. As stated in Cozzolino v. State, 584 S.W.2d 765 (footnote 1) (Tenn. 1979) "[n]o limitation is imposed on the mitigating factors that may be raised by the defendant." (Citations omitted), See Houston v. State, 593 S.W.2d 267 (footnote 1) (Tenn. 1980). T.C.A. 39-2404(c) (1981) Supp.) provides that"

> [i]n the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated...below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be

> received regardless of its admissibility under the rules of evidence. (Emphasis added)

However, in the face of these liberal statutes going to the issue of punishment, the trial court below refused to allow petitioner to present testimony regarding the Christian philosophy of death as punishment for crime and its deterrent effects. The trial court ruled the Christian philosophy irrelevant and the evidence as to the deterrent effect of capital punishment was ruled inadmissible based on the lack of qualifications of the testifying witness. The introduction of testimony concerning the Christian philosophy of death as a punishment and the deterrent effect of capital punishment is of very relevant and very probative value. The statute specifically states that "[a]ny such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence." T.C.A. 39-2404(c)(1981 Supp.) To deny petitioner his right to introduce such evidence when the statute on its face undoubtedly allows such testimony, renders the Tennessee death statute confusing and vague to say the least. Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). The Supreme Court of Tennessee has recently attempted to narrow the construction of the Tennessee death statutes. Houston v. State, (supra at 275), Cozzolino v. State, (supra at 768). However, these attempts were after the trial of Petitioner.

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 at 883, 96 S.Ct. 2909 (1976). To have such a broad statute and yet deny petitioner his right to address the jury on the ultimate issue of death and its deterrent effect is to make a farce and a mockery of the proceedings.

The Christian philosophy of death as punishment for crime as well as the deterrent effects of capital punishment is definitely relevant and probative. As stated in Gregg, 49 L.Ed.2d at 883 "[i]t is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner." With a jury determining whether a

person should live or die, it is of utmost importance to allow discussion on the very real issue: capital punishment. The jury should not be considered knowledgable in the field, outside of their own previously conceived feelings. It is incurbent on the petitioner's right to a fair trial to have an opportunity to confront the jury with the philosophical as well as factual aspects of the death penalty and its place in the criminal justice system. As stated by Chief Justice Burger dissenting in Furman v. Georgia, 408 U.S. 238, 402, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) "the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process." (J. Blackmun & J. Powell join dissenting). "The nonavailability of corrective or modifying mechanism with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 at 990, 98 S.Ct. 2954 (1978).

That the jury should be confronted with the ultimate issue of death as punishment for crime is made apparent by this Court's own statements. The Court stated in Gregg, 49 L.Ed.2d at 884 (citations omitted)

> [j]ury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system - a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

Continuing, the Court in Gregg stated at 49 L.Ed 2d 884

> [i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury to people who never before have made a sentencing decision.

"Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question." Gregg, 49 L.Ed.2d at 884. (Citations omitted).

> So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision. Gregg, 49 L.Ed.2d at 891-2.

The Tennessee death penalty statute does not provide adequate guidance. The Chief Justice of the Tennessee Supreme Court has found it to be "arbitrarily and capriciously impose" State v. Dick, 615 S.W.2d 126, 141 (Tenn. 1981) (dissenting opinion). To read the statute is to realize that it encourages the admission of evidence having "relevant" and probative value on the issue of punishment", to the extent that such evidence will be admissible "regardless of its admissibility under the rules of evidence", T.C.A. 39-2404(c)(1981 Supp.); but yet to have the courts deny petitioner his opportunity to present evidence on the Christian philosophy of death as a punishment for crime and on the deterrent effects of capital punishment, ultimately deprives the petitioner of his right to due process, a fair trial, and violates the standards as set forth by this Court in Furman v. Georgia. The statute

> must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationable reviewable the process for imposing a sentence of death'. As was made clear in Gregg, a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur.

Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 at 406, 100 S.Ct. 1759 (1980) (citations and footnotes omitted). An arbitrary code of evidence, such as that provided for in the Tennessee death statute, denied petitioner of a fair trial. Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 738, 99 S.Ct. 2150 (1979). "In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg, 49 L.Ed. at 887.

As such, T.C.A. 39-2404(c)(1981 Supp.), T.C.A. 39-2404(j)(1981 Supp.), and the court's interpretation of such statute at the time of petitioner's trial, deny petitioner his due process rights, his right to

a fair trial, and his right to be free of cruel and unusual treatment under the standards as developed by this Court in Furman v. Georgia and its progeny, and Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. [illegible] (1980) (in Godfrey the Court found the Georgia death penalty statute "unconstitutionaly vague." 64 L.Ed.2d at 410 (emphasis added) (J. Marshall, with whom J. Brennan joins, concurring).

It should be pointed out that the State of Tennessee introduced during petitioner's sentencing hearing as their case in chief evidence of three prior juvenile adjudications, two misdemeanor convictions, one prior felony conviction, and evidence of petitioner's remarks to a fellow jail inmate that he had previously been involved in several robberies. This evidence was admitted solely as of character, and as rebuttal evidence to any mitigating circumstances petitioner may later introduce. (See trial record at 1371 and 1387). Such evidence was not relevant to any of the statutory aggravating circumstances as listed in the Tennessee death penalty statute, T.C.A. 39-2404(i). The only relevance this evidence had to the sentencing hearing was that it related to Petitioner's character and would serve as rebuttal evidence to any mitigating circumstances later introduced by the petitioner. As such, the state introduced evidence otherwise inadmissible save for the liberal evidentiary rules provided for pursuant to T.C.A. 39-2404(c)(1981 Supp.). The defendant had never taken the stand. In Tennessee, aside from T.C.A. 39-2404(c)(1981 Supp.), the state cannot attack the accused's character until he puts it in issue. Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950), Paine, Tennessee Law of Evidence, pp. 14, 15 (1974). Impeachment on character grounds is allowed, obviously, only if the accused takes the stand. Paine, (supra) at Section 17. Specific acts of the accused are not admissible to show particular relevant traits. Keith v. State, 127 Tenn. 40, 152 S.W. 1029 (1913); Arterburn v. State, 216 Tenn. 240, 391 S.W.2d 648 (1965). Conviction for a crime, either felony or misdemeanor, is admissible to impeach, as are proof of prior bad acts. Paine, Tennessee Law of Evidence, 202, 206 (1974). However such evidence is held to strict standards concerning type of prior act or conviction, remoteness, and

extent of inquiry allowed. State v. Morgan, 541 S.W.2d 385 (Tenn. 1976). It is also necessary to stress that such evidence of prior acts and convictions are for impeachment purposes only.

Evidence, otherwise inadmissable, of prior convictions and prior bad acts were introduced against the Petitioner in his sentencing hearing strictly under the liberal interpretation by the court of T.C.A. 39-2402(c)(1981 Supp.). Petitioner had not put his character in issue, had not taken the stand for impeachment purposes, and had, at that time, not introduced any mitigating circumstances to be rebutted by the state. Yet all this otherwise inadmissable evidence was allowed in under the ruling that T.C.A. 39-2404(c)(1981 Supp.) allowed such.

Following the leniency allowed the state, the court ruled Petitioner could not introduce evidence on the Christian philosophy of death as punishment for crime. The court found it to be irrelevant. Neither could the Petitioner introduce evidence on the deterrent effects of capital punishment as the court felt the expert attempting to testify on such matters, a Ph.D. from Vanderbilt University with a graduate degree in Social Ethics and a graduate minor in Sociology, was not qualified.

To allow leniency to the state, or rather to read the statute at face value, but yet to require stricter adherence to evidentiary matters by the accused, in the face of a broad evidentiary statute providing for the reception of evidence "regardless of its admissibility under the rules of evidence" T.C.A. 39-2404(c)(1981 Supp.), is to make a farce and a mockery of Petitioner's right to due process, a fair trial, and his right to be free of arbitrary and capricious treatment under Furman v. Georgia and his right to be free of "unconstitutional vague" death penalty statutes under Godfrey v. Georgia. The Christian philosophy of death as punishment for crime and the deterrent effects of capital punishment are obviously of "probative value on the issue of punishment" T.C.A. 39-2404(c)(1981 Supp.), and should have been admitted for the accused.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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JOHN A. PARKER, Clerk
By _____

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

DESIGNATED

FOR PUBLICATION

STATE OF TENNESSEE,

APPELLEE

VS.

DONALD WAYNE STROUTH,

APPELLANT

SULLIVAN CRIMINAL

HON. EDGAR P. CALHOUN,

JUDGE

DOCKET NUMBER 13 S. CT.

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JUDGMENT OF CONVICTION OF MURDER IN THE FIRST DEGREE:
AFFIRMED

JUDGMENT OF CONVICTION OF ROBBERY BY USE OF A DEADLY WEAPON:
REVERSED AND
INDICTMENT DISMISSED

COOPER, JUSTICE

APPENDIX "A"

O P I N I O N

This case is before us on appeal by Donald Wayne Strouth from a judgment entered in the Criminal Court for Sullivan County, Tennessee. See T.C.A. § 39-2406.[1] Specifically, the judgment approved the jury's verdicts (1) finding appellant guilty of robbery by the use of a deadly weapon and fixing his punishment at forty years in the state penitentiary, and (2) finding appellant guilty of murder in the first degree and fixing his punishment at death by electrocution.

Appellant was convicted of killing James Keegan in the course of the robbery of the Budget Shop in Kingsport, Tennessee. On February 16, 1978, Mr. Keegan's body was found on the floor of his place of business. His throat had been cut and there was evidence of a severe blow to his head. Death was due to the throat wound which, according to medical testimony, was inflicted while Mr. Keegan was unconscious from the

[1] Although this case was submitted to the court earlier than some of the other reported decisions herein referred to, in the course of regular assignment and release of opinions the decisions in those cases were earlier. In one of the first decisions in which this court approved the imposition of the death penalty under present statutes, Houston v. State 593 S.W.2d 267 (Tenn. 1980), cert. denied, 101 S.Ct. 251 (1980), review was sought in the United States Supreme Court. That review was not completed until December, 1980. This court deemed it prudent not to release further opinions approving the imposition of the death penalty pending that review. Subsequently Justice Brock, to whom the record in the present case was initially assigned, concluded that imposition of the death penalty under any circumstances violated provisions of the Tennessee Constitution. See his dissenting opinion in the case of State v. Dicks, released February 2, 1981. Thereafter the undersigned was designated to prepare the opinion of the court in the present case.

head injury. Mr. Keegan's pockets were turned inside out, and his billfold and "roll" of money were missing.

Appellant and Jeffrey Stuart Dicks subsequently were arrested and charged with the robbing and killing of Mr. Keegan. The defendants were tried separately[2] to avoid the possibility of a Bruton[3] violation inherent in the fact that each of the defendants gave investigating officers statements implicating the other. On trial, appellant was found guilty of murder in the perpetration of a robbery and robbery with a deadly weapon. In the subsequent sentencing hearing on the felony murder conviction, the jury found the following aggravating circumstances:

> The murder was especially heinous, atrocious or cruel in that it involved torture and depravity of mind;[4] and
>
> The murder was committed while the defendant was engaged in committing robbery.[5]

The jury also found that "there [were] no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances," and sentenced appellant to death.

The trial judge approved the death sentence on the felony-murder conviction, and also approved the sentence of forty years imposed by the jury on its finding

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[2] State v. Dicks, ___S.W.2d___(Tenn. 1981), wherein the first degree murder conviction and death sentence of Jeffrey Stuart Dicks was affirmed.

[3] Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476 (1968).

[4] T.C.A. § 39-2404(i)(5).

[5] T.C.A. § 39-2404(i)(7).

appellant guilty of robbery with a deadly weapon.

Appellant does not question the sufficiency of the convicting evidence as to either offense, but does question rulings by the trial judge on pre-trial motions, voir dire, admission of evidence, conduct of the officer in charge of the jury, and comments by the prosecutor during the course of the trial. Appellant also challenges the constitutionality of the Tennessee Death Penalty Act on several bases, and insists that his conviction of both robbery and felony murder are violative of the Fifth Amendment to the Constitution of the United States and Article 1, Section 10 of the Constitution of the State of Tennessee. We find no merit in any of the charged errors except the latter.

In Briggs v. State, 573 S.W.2d 157 (Tenn. 1978) this court held that dual convictions of felony-murder and the underlying felony are offensive to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and of Article 1, Section 10 of the Constitution of the State of Tennessee and that the conviction of the underlying felony can not stand. Accordingly, the conviction of appellant for armed robbery is vacated.

The several bases of appellant's challenge to the constitutionality of the Tennessee Death Penalty Act have been considered in detail and have been rejected by this court in cases decided during the time appellant's case has been on appeal. For example, the contentions now made with respect to the alleged vagueness

of the statutes, mandatory imposition of the death penalty, use of hearsay evidence in the sentencing hearing, and that the statute gives the jury "unguided and unrestrained" discretion in imposing the death penalty were considered and rejected in Houston v. State, 593 S.W. 267 (Tenn. 1980), cert. denied, 101 S.Ct. 251 (1980). See also State v. Dicks, _____S.W.2d _____(Tenn. 1981). The contention that the Death Penalty Act is defective in that it does not specifically require notice to the accused of the particular aggravating circumstances upon which the State intends to rely in seeking the death penalty was considered in State v. Berry, 592 S.W.2d 553 (Tenn. 1980), and in State v. Houston, supra., and was rejected. Likewise found to be without merit was the challenge to the efficacy of T.C.A. § 39-2406(c) and Rule 46 (now Rule 12) of the Rules of the Supreme Court of Tennessee to provide for adequate comparative review of sentences imposed on defendants found guilty of murder in the first degree. See State v. Groseclose, et al., _____S.W.2d_____(Tenn. 1981).

Appellant insists that the jury selection procedure followed by the trial judge, and the statute upon which the procedure was based, operated to systematically exclude women from the venire, thus depriving appellant of the constitutional right to be tried by a jury representative of the community. The record does not bear out appellant's charge. The statute in effect at the time of appellant's trial, T.C.A. § 22-101, granted women the option of serving on the jury or not.

The trial judge, being cognizant of the decision in Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975) voicing disapproval of a blanket exclusion of women from service on the jury, did not follow the statute in selecting the jury venire for appellant's trial, but only excluded jurors "for cause," whether man or woman. Further, the record shows that three of the twelve jurors selected to hear the charges against appellant, and both alternate jurors, were women. This is a fair representation of women on the jury and that is all that is required by the Constitution of the United States. See State v. Jefferson, 529 S.W.2d 674 (Tenn. 1975).

Appellant also insists the trial judge erred in refusing to order the clerk to prepare and present to appellant a list of prospective jurors, together with information required by Rule 24(g) of the Tennessee Rules of Criminal Procedure, prior to the initiation of appellant's trial. We find no basis in the record for this charge. The names and addresses of prospective jurors were given to appellant several weeks prior to the date of trial. Additional information relative to the jurors, such as, occupation, name of spouse, occupation of spouse, and whether a prospective juror had served previously on a criminal court jury, was delivered to appellant as soon as the information could be collected and collated, and the information was delivered prior to the date the trial began. The record then shows that the action taken by the trial judge and the clerk to get

information concerning prospective jurors into the hands of appellant was as expeditious as possible and that appellant was not prejudiced in any way.

Appellant further charges that the jury selected was oriented to conviction and to the imposition of the death penalty, and that the orientation was due to errors committed by the trial judge in conducting the voir dire. Appellant also insists that the trial judge committed error in refusing to continue the case to give appellant the opportunity to present evidence indicating that a jury of persons without conscientious objections to the death penalty is biased in favor of conviction.

In Smith v. State, 205 Tenn. 502, 524-25, 327 S.W.2d 308, 318 (1959), cert. denied, 361 U.S. 930, this court pointed out that:

> A voir dire examination is for the purpose of advising counsel of the juror's qualification, interest, or bias, as a matter of fact, presupposing his statutory competence, that is, age, residency, etc. The subjacent purpose is to enable the exercise of one's peremptory challenges[citations omitted]. In this process, it has been held, and it seems to us fairly so, that proper fields of inquiry include the juror's occupation, habits, acquaintanceships, associations, and other factors, including his experiences, which will indicate his freedom from bias.

No restrictions were placed by the trial judge upon appellant's examination of prospective jurors concerning these subjects. The court, however, did refuse to permit appellant to question jurors concerning their understanding of the unanimity necessary to reach a verdict and sentence of death. The trial judge's ruling was in accord with T.C.A. § 39-2404(h), which provides that "[t]he judge shall not instruct the jury, nor shall the

attorneys be allowed to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment."

The trial judge also prohibited counsel from asking the following question of prospective jurors: "Do you realize that if Mr. Strouth is sentenced to die that he will actually be killed?" We see no prejudicial error in this ruling. Speculation on whether a sentence will be carried out is foreign to the issue of guilt and is not a proper consideration for the jury in determining the sentence to be imposed. See Farris v. State, 535 S.W.2d 608, 614 (Tenn. 1976).

Appellant further contends the trial judge erred in refusing to allow him "to examine and rehabilitate the voir dire of a prospective juror, Mary J. Penley," who was excused from jury service "for cause." Rule 24(b) of the Tennessee Rules of Criminal Procedure directs the trial judge to excuse a juror from the trial of a case where the examination of the juror reveals grounds for challenge for cause. Commission comments to the rule emphasize that extreme care should be taken in trying to rehabilitate a prospective juror into vocalizing impartiality. During voir dire, Mrs. Penley repeatedly and unequivocally told the trial judge she would automatically vote against the death penalty, whatever the evidence.[6]

---

[6] See Witherspoon v. Illinois, 391 U.S. 10, 513-514, 88 S.Ct. 1770, 1772, 20 L.Ed.2d 776 (1968) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2960-2961, 57 L.Ed.2d 973 (1978), which allow the trial judge to excuse for cause any juror who expresses an inability to follow the law and instruction of the trial judge on capital punishment.

Her statements left no leeway for rehabilitation, and left the trial judge with no alternative but to disqualify her "for cause."

In the remaining assignment of error directed to the voir dire, appellant insists questions asked of prospective jurors were calculated to call attention to appellant's silence should he exercise his right not to testify. This issue was not included in appellant's motion for a new trial and, consequently, is deemed to be waived. See Rule 3(e) of the Tennessee Rules of Appellate Procedure. But due to the gravity of this case, we have considered the assignment and found it to be without merit. If the questions asked on voir dire by the district attorney general could be construed as a comment on the exercise by appellant of his right to remain silent, the record shows that the trial judge, sua sponte, instructed the district attorney general not to pursue that line of questioning and instructed the jurors fully on the rights of appellant. Under these circumstances, we see no prejudice resulting to appellant from questions asked of prospective jurors by the district attorney general.

Next, appellant contends that the trial judge erred in failing to grant him a continuance to allow him the opportunity to develop evidence that "a jury made up solely of a 'death qualified jury' would too readily ignore presumptions of innocence and accept the prosecution's version of the facts." A motion for a continuance is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed

in the absence of an abuse of discretion to the prejudice of the defendant. Moorehead v. State, 219 Tenn. 271, 274-275, 409 S.W.2d 357, 358-359 (1966); Woods v. State, 552 S.W.2d 782, 784 (Tenn. Crim. App. 1977). We see no abuse of discretion on the part of the trial judge, nor prejudice to the defendant resulting from the denial of the motion for a continuance. The continuance was not sought until the trial had been in progress for two and one-half days. Furthermore, the issue that was the basis of the continuance had been decided adversely to appellant in Spinkellink v. Wainwright, 578 F.2d 582, (5th Cir. 1978), cert. denied, 99 S.Ct. 1548 (1978).

Issue is also taken by appellant to the introduction in evidence during the "guilt-innocence" phase of the trial of "before" and "after" photographs of Mr. Keegan. As pointed out in State v. Jeffrey Stuart Dicks, ____S.W.2d_____, (Tenn. 1981), where the same photographs were introduced, we find no prejudicial error in the admission of the photographs.

> . . .[I]t would have been better had the "before" picture of Mr. Keegan been excluded since it added little or nothing to the sum total of knowledge of the jury. The other two pictures, however, were relevant to material issues in the trial and were not inflammatory. The picture of Mr. Keegan taken at the scene of the homicide, and which does not show the neck would, was a necessary predicate to proof that Mr. Keegan was unconscious at the time his throat was cut. The physician, who so testified, did so partly on the photographic evidence showing the position of Mr. Keegan's body and the absence of blood on Mr. Keegan's hand as shown in the photograph, and partly on the description of the wound.

Appellant insists the trial judge erred during the sentencing phase of the trial by permitting the State

to introduce evidence of appellants convictions in North Carolina and in the juvenile courts of Maryland. The basis of appellant's insistence is the alleged failure of the state to provide copies of the convictions to appellant as required by Rule 16(a)(1)(b) of the Tennessee Rules of Civil Procedure. Prior to the sentencing hearing, defense counsel stated and the trial judge held that the State had complied with appellant's motion to discover previous convictions of appellant which would be introduced in evidence. At the sentencing hearing, the defendant asserted that he had not seen the certified copy of the conviction for crime against nature in North Carolina, nor had he been provided with the information from Maryland. It was then brought out that the defendant had been given a copy of defendant's F.B.I. sheet which showed the North Carolina conviction. Further, the record shows that the charging documents from Maryland had just been received by the district attorney general and that they were then available to the defendant. The trial judge allowed the defendant to examine the documents, before proceeding. We think these circumstances demonstrate a substantial compliance with the Discovery required by the Rules of Criminal Procedure and that the trial judge properly admitted appellant's convictions in evidence.

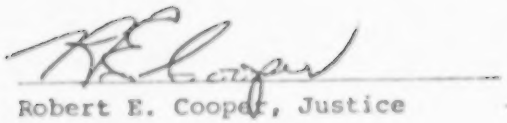
The closing argument of the district attorney general on the sentencing phase of the trial also is attacked by appellant. We have carefully considered the argument and are of the opinion that the trial judge

correctly ruled on objections to the argument and that, in context, the argument was within the bounds of reason.

Appellant also charges that jury misconduct occurred during the sentencing phase of the trial. Specifically, appellant charges that the officer in charge of the jury allowed the jury to be confronted by their families while the jury was sequestered. The incident that is the basis of this assignment occurred on September 3, 1978, at the motel where the jurors were staying. The jurors' relatives were bringing clothes to the jurors. A two and one-half year old girl walked to her grandfather, who gave her some money, and then walked back to her grandmother. There was no conversation between these people. The court officers relayed the clean and dirty clothes between the two groups. We agree with the trial judge that these actions do not constitute misconduct and do not contaminate the jury.

The judgment of conviction for robbery with a deadly weapon is reversed and the indictment dismissed. The judgment of conviction for murder in the first degree and the sentence of death imposed pursuant thereto is affirmed. The sentence will be carried out as provided by law on November 3, 1981, unless otherwise stayed or modified by appropriate authority. Costs are taxed against appellant.

I am authorized to state that Justice Brock concurs in the affirmance of conviction but dissents from the imposition of the death penalty for the reasons expressed in his dissent in State of Tennessee v. Jeffrey Stuart Dicks.



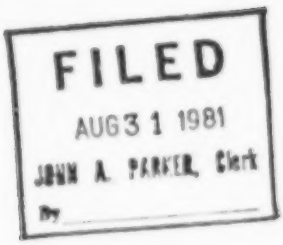
Robert E. Cooper, Justice

Concur:
Harbison, C.J.
Fones, J.

Dissent:
Brock, J.

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE



STATE OF TENNESSEE, APPELLEE	)	
VS.	)	SULLIVAN CRIMINAL
	)	DOCKET NO. 13 S. CT.
DONALD WAYNE STROUTH, APPELLANT	)	

OPINION ON PETITION TO REHEAR

Appellant has filed a petition to rehear calling this court's attention to evidence that was excluded by the trial judge during the sentencing hearing. Appellant insists the evidence was admissible under the broad guidelines laid down in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed. 2d 973 (1978), and that the trial court committed error of constitutional dimension in excluding the evidence.

In Lockett v. Ohio, supra, the Supreme Court

held that the:

> Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kinds of capital cases, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The court emphasizes, however, in a footnote to this sentence that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumstances of his offense." 98 S.Ct. at 2965 n. 12.

The evidence excluded in this case related to the deterrent effect, if any, of the death penalty, and to the fact that the Christian attitude toward the death penalty is a philosophy of mercy. This evidence has no bearing on the defendant's character, prior record or the circumstances of his offense and in our opinion, was properly excluded as being irrelevant.

Appellant also takes issue with this court's holding that T.C.A. § 39-2404(i)(5)--one of the aggravating circumstances found by the jury in returning the death sentence--is not unconstitutionally vague and overbroad. Appellant insists it is constitutionally infirm because of vagueness and that the circumstances of this homicide do not support a finding that the victim was tortured or that the defendant's acts evinced depravity of mind, citing Godfrey v. Georgia, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980).

The questioned section of the statute provides that:

> (i) No death penalty shall be imposed but upon a unanimous finding, . . . , of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:
>
> * * *
>
> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

This court has consistently held that this aggravating circumstance is directed to the conscienceless or pitiless act of a defendant which is unnecessarily torturous to the victim, or evinces a depraved state of mind; and that the depraved state of mind or the torture inflicted must meet the test of heinous, atrocious, or cruel. See State v. Pritchett, ___ S.W.2d _____(Tenn. 1981); State v. Coleman, _____S.W.2d_____ (Tenn. 1981); State v. Grosclose, et al., 615 S.W.2d 142 (Tenn. 1981); State v. Dicks, 615 S.W.2d 126 (Tenn. 1981). This holding or construction, in our opinion, meets the test of Godfrey v. Georgia, supra, and also that voiced in Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed. 2d 913 (1976).

Appellant and his companion-in-crime, Jeffrey Dicks, struck James Keegan on the head with a rock, rendering him unconscious. While Mr. Keegan was in an unconscious state, appellant and his companion slit Mr. Keegan's throat and left him to bleed to death--a cold-blooded, intentional, conscienceless and pitiless act. An act which can only be characterized as heinous and atrocious, and one which evinces a depraved state of mind and justifies the imposition

of the death penalty, no mitigating circumstance being shown.

The petition to rehear is overruled, with costs being adjudged against the appellant.

Mr. Justice Brock adheres to the views expressed in this case and in his dissenting opinion in State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).

Robert E. Cooper, Justice

Harbison, C.J. and
Fones, J. concur.
Brock, J., concurs and dissents.

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when there is a dispute in the testimony of the witnesses. Wilson v. State, 574 S.W.2d 52 (Crim. App. 1978).

The degree of homicide in the killing was for the jury to determine as shown by the facts. Wilson v. State, 574 S.W.2d 52 (Crim. App. 1978).

The question of a defendant's sanity or insanity at the time of a crime is one for the jury to resolve from the facts and circumstances present in a case upon proper instructions from the court. McDonald v. Tennessee, 486 F. Supp. 550 (M.D. Tenn. 1980).

Question of malice is for the jury's determination as is the issue of self-defense. State v. Venable, 606 S.W.2d 298 (Tenn. Crim. App. 1980).

The issues of self-defense and degree of homicide are for the jury to decide in the light of all of the circumstances of the killing. State v. Gilbert, 612 S.W.2d 188 (Tenn. Crim. App. 1980).

16. Indictment.

Where the indictment under which defendant was convicted of second degree murder clearly set out the common law offense of first degree murder, without reference to § 39-2402 or any other statute, the court held that it was not demurrable or subject to motion to quash on the ground that § 39-2402 as amended by P.L. 1973, ch. 192, §§ 1, 6 was unconstitutional (which it was held to be under Tenn. Const., art. 2, § 17, as broader in purview than its caption in State v. Hailey (1974), — Tenn. —, 502 S.W.2d 712), and that any question as to punishment for first degree murder was mooted by the verdict of second degree murder. Bramlett v. State (1974), — Tenn. —, 515 S.W.2d 895.

Where an indictment clearly set out the common law offense of first degree murder, without reference to this section or § 39-2402, second degree murder was an included offense thereunder as a matter of law. Bramlett v. State (1974), — Tenn. —, 515 S.W.2d 895.

17. Conduct of Court and Counsel.

In prosecution resulting in conviction of second-degree murder, the trial judge's allowing the defenses of self-defense and defense of habitation but instructing defendant's attorney not to argue the theory of accidental death to the jury was error which required a retrial of the case. Drake v. State, 576 S.W.2d 592 (Crim. App. 1978).

DECISIONS UNDER PRIOR LAW

1. Vehicular Homicide.

Driving an automobile while under the influence of an intoxicant is malum in se and supplies the criminal intent necessary to sustain a conviction. Farr v. State, 591 S.W.2d 449 (Tenn. Crim. App. 1979).

The driving of a motor vehicle in willful or wanton disregard for safety of persons or property is malum in se. Farr v. State, 591 S.W.2d 449 (Tenn. Crim. App. 1979).

The requisite element of malice may be, and in most vehicular homicide cases, must be, implied from the surrounding circumstances. Farr v. State, 591 S.W.2d 449 (Tenn. Crim. App. 1979).

Collateral References. Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 A.L.R.3d 1132.

Homicide as affected by lapse of time between injury and death. 60 A.L.R.3d 1323.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

39-2404. Punishment for murder in first degree — Sentencing proceeding — New trial. — (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

APPENDIX "B"

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(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt o sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/_____
Jury Foreman

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____
Juror

/s/_____ /s/_____
Juror Juror

/s/_____ /s/_____
Juror Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/_____ /s/_____
Jury Foreman Juror

/s/_____ /s/_____
Juror Juror

/s/_____ /s/_____
Juror Juror

/s/_____ /s/_____
Juror Juror

/s/_____ /s/_____
Juror Juror

/s/_____ /s/_____
Juror Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

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(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

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(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, § 4600 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6441; Code 1932, § 10770; Acts 1977, ch. 51, § 2; 1981, ch. 33, § 1.]

Amendments. The 1981 amendment added subsection (j)(12).

Effective Dates. Acts 1981, ch. 33, § 2. March 19, 1981.

Law Reviews. Criminal Law in Tennessee in 1979 — A Critical Survey, III. Procedure (Joseph G. Cook), 48 Tenn. L. Rev. 19.

Justice on the Tennessee Frontier: The Williamson County Circuit Court 1810-1820, 32 Vand. L. Rev. 413.

The Death Penalty in Tennessee — Recent Developments (Roy B. Morgan, Jr.), 8 Mem. St. U.L. Rev. 107.

Cited: Claiborne v. State, 555 S.W.2d 414 (Crim. App. 1977).

NOTES TO DECISIONS

ANALYSIS

1. In general.
1. Constitutionality.
2a. Duty of judge as thirteenth juror.
4. Instructions.
14. Notice.
15. Evidence admissible.

1. In General.

This statute does not deprive the jury of any knowledge of relevant evidence, or aggravating circumstances or mitigating circumstances, necessary for them to fix punishment. It does no more than prevent the judge and counsel from informing the jury of the effect of its disagreement on which sentence should be imposed. The aftereffect of a jury's deliberation is not a proper consideration for the jury. Houston v. State, 593 S.W.2d 267 (Tenn. 1979).

1. Constitutionality.

See note under heading "Constitutionality," § 39-2406, Notes to Decisions, Miller v. State, 584 S.W.2d 758 (Tenn. 1979).

This state is not prohibited from imposing the death penalty in the manner set forth in § 39-2402 et seq. by the restrictions placed on it by the U.S. Const., 8th and 14th amends., and by Tenn. Const., art. 1, §§ 9 and 16. Houston v. State, 593 S.W.2d 267 (Tenn. 1979).

This state is not prohibited from imposing the death penalty in the manner set forth in this and the following sections. Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979).

To allow a bifurcated trial in all capital cases in which circumstances mitigating punishment may be shown while a unitary trial is required on not guilty pleas before a jury does not show an irrational or unreasonable classification amounting to a denial of equal protection. Scalf v. State, 565 S.W.2d 506 (Crim. App. 1978).

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Opposition

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81-5786

DONALD WAYNE STROUTH,

PETITIONER,

V.

STATE OF TENNESSEE,

RESPONDENT.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether certain sections of Tennessee Death Penalty Act are unconstitutional.

2. Whether the Tennessee Supreme Court's determination that substantial compliance was had with the state discovery rules presents a substantial federal question.

3. Whether the trial judge erroneously excluded evidence at sentencing.

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OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 620 S.W.2d 467.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on June 8, 1981. Petitioner's petition to rehear was denied on August 31, 1981. After receiving an extension of time, petitioner timely filed his Petition for Writ of Certiorari with this court.

STATEMENT OF THE CASE

Donald Wayne Strouth and Jeffrey Stuart Dicks were indicted for first degree murder by the March 1978 Term of the Sullivan County Grand Jury on May 2, 1978. On July 24, 1978, petitioner Strouth filed a motion to dismiss alleging the first degree murder statute was unconstitutional. This motion was overruled on August 24, 1978. After approximately three days of jury selection, the two day trial was completed on September 1, 1978. After due deliberation, the jury found petitioner guilty of first degree murder. On September 2, 1978, the jury heard evidence on sentencing and began deliberation. On September 4, 1978 the jury, after due deliberation, fixed punishment for the first degree murder charge at death by electrocution. The jury unanimously found the following statutory aggravating circumstances: "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind" and "the murder was committed while the defendant was engaged in commiting robbery." The jury unanimously found that "there are no mitigating circumstances sufficiently substantial to outweigh (sic) the statutory aggravating circumstances or circumstances so listed above."

Petitioner appealed to the Tennessee Supreme Court which affirmed this judgment. Jeffrey Stuart Dicks was separately tried after a change of venue and also sentenced to death after being convicted of first degree murder. State v. Dicks, 615 S.W.2d 126 (Tenn. 1981), cert. denied 50 U.S.L.W. 3279 (U.S. October 13, 1981).

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this court or decide such question in a way not in accord with the applicable decisions of this court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

TENN. CODE ANN. § 39-2404 DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN ALLOWING THE IMPOSITION BY THE JURY, FOLLOWING THE PRESCRIBED STATUTORY PROCEDURES OF A SENTENCE OF DEATH FOR A PERSON CONVICTED OF FIRST DEGREE MURDER.

A. Tenn. Code Ann. § 39-2404(c) which allows the trial judge discretion in determining the admissibility of evidence relevant to punishment, is constitutional.

Tenn. Code Ann. § 39-2404(c) provides:

"In the sentencing proceeding, evidence may be presented as to any matter that the court

> deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee."

This statute allows the trial judge to admit, consistent with the mandates of this court, all possible relevant information about the individual defendant. Gregg v. Georgia, 428 U.S. 153, 189-90, 203 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976). See Proffitt v. Florida, 428 U.S. 242, 247-48 (1976); Williams v. New York, 337 U.S. 241, 247-48, 251 (1949).

This issue does not warrant the granting of certiorari. Austin v. State, 618 S.W.2d 738, 742 (Tenn. 1981), cert. denied ___ U.S.L.W. ___ (No. 81-598 U.S. December 14, 1981).

B. Tenn. Code Ann. § 39-2404 provides the necessary guidance for the jury to consider aggravating and mitigating circumstances in determining whether to impose a sentence of death.

Tenn. Code Ann. § 39-2404(e), (f), and (g) deal with the manner in which the jury arrives at punishment. In Gregg v. Georgia, 428 U.S. 153, 192 (1976), this court made it clear that some guidance must be given the jury in arriving at a punishment when the death penalty is a possible punishment:

> "Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given [in the sentencing hearing]. ...It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant

> that the state, representing organized society, deems particularly relevant to the sentencing decision."

The legislature of Tennessee provided for the necessary guidance of the jury by detailing the manner in which the jury is to arrive at punishment, and by requiring the jury to consider evidence of aggravating circumstances and of mitigating circumstances, as provided in subsections (f) and (g) of Tenn. Code Ann. § 39-2404. Subsection (3) provides that all evidence introduced at both the guilt and sentencing hearings may be considered in arriving at punishment.

Under these statutes, in arriving at the sentence, the jury must first determine whether the state has proved any of the statutory aggravating circumstances beyond a reasonable doubt. If the jury finds that none of the statutory aggravating circumstances has been established by the state beyond a reasonable doubt, they must return a verdict of life imprisonment. Tenn. Code Ann. § 39-2404(f).

To arrive at a punishment of death, the jury must find that the state has established a statutory aggravating circumstance or several statutory aggravating circumstances beyond a reasonable doubt. Additionally, however, the jury must find that the statutory aggravating circumstance or circumstances so found are not outweighed by one or more mitigating factors. These separate determinations must be put in writing and given to the judge along with the sentence of death, thus assuring that the jury has gone through the correct analysis in arriving at a death sentence. This is the suggested procedure of the Model Penal Code § 201.6 Comment 3 (Tent. Draft No. 9, 1959) at 72 noted with approval in Jurek v. Texas, 428 U.S. 262, 271 n.6 (1976). This procedure was followed in the instant case with the jury finding two aggravating circumstances and no mitigating circumstances sufficiently substantial to outweigh these circumstances.

Tenn. Code Ann. §§ 39-2404(i) and 39-2404(j) set forth the aggravating and mitigating circumstances. Any relavant factor may be considered in mitigation, not just the specified statutory factors. These circumstances are presented for the jury to consider to weigh in exercising its "controlled" discretion in a determination of what sentence should be imposed. The jury is not required to return a mandatory verdict of death. It must consider mitigating factors. Houston v. State, 593 S.W.2d 267, 277 (Tenn.), cert. denied 449 U.S. 891 (1980). Thus, this statute provides a constitutional procedure. Proffitt v. Florida, 428 U.S. 242, 248-49 (1976). See Profitt, supra, 428 U.S. at 260-61 (White, J. concurring).

This court in Gregg v. Georgia, 428 U.S. 153, 199 (1976) does not require that "mercy" be a factor considered by the jury. It does, however, allow for such consideration, perhaps in the "weighing" of factors, when it recognizes the proportionality requirement on review prevents caprice but would allow "the isolated decision of a jury to afford mercy." 428 U.S. at 203. Such an issue does not warrant the granting of certiorari. State v. Groseclose, 615 S.W.2d 142, 150 (Tenn. 1981), cert. denied 50 U.S.L.W. 3250 (U.S. October 5, 1981); Houston v. State, 593 S.W.2d 267 (Tenn.) cert. denied 449 U.S. 891 (1980).

Petitioner's argument on the shifting of the burden of persuasion is merely a variation of his mandatory death penalty argument. For the reasons stated above, such an allegation does not warrant the granting of certiorari. See State v. Pierre, 572 P.2d 1338 (Utah 1977), cert. denied 439 U.S. 882 (1978). Furthermore, this court, in Mullaney v. Wilbur, 421 U.S. 684, 697 n.23 (1975) explicitly holds its determination is not incompatible with the traditional discretion afforded sentencing bodies.

C. Tenn. Code Ann. § 39-2404(i)(5) is not unconstitutionally vague or overbroad.

Petitioner contends that Tenn. Code Ann. § 39-2404 (i)(5), an aggravating circumstance, which provides "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind", is vague and unconstitutional as written. The same allegation was raised in Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) in which this court held that an identical aggravating circumstance under the Florida death sentence statutes was not impermissibly vague as it has been construed by the Florida Supreme Court. See Gregg v. Georgia, 420 U.S. 153, 200-203 (1976). See also Spinkellink v. Wainwright, 578 F.2d 582, 610-12 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979). This allegation does not warrant the granting of certiorari. State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981), cert. denied 50 U.S.L.W. (U.S. October 5, 1981).

II.

THE TENNESSEE SUPREME COURT'S RULING THAT SUBSTANTIAL COMPLIANCE WAS HAD WITH A PRE-TRIAL DISCOVERY MOTION PRESENTS ONLY A QUESTION OF STATE LAW.

In his second issue, petitioner complains of the Tennessee Supreme Court's ruling, 620 S.W.2d at 472, that substantial compliance was had with petitioner's request for copies of his previous convictions. This issue presents only a question of state law and procedure. Tenn. R. Crim. P. 16(a)(1)(B). There is no constitutional right to discovery. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

III.

THE TRIAL JUDGE'S RULINGS DENYING ADMISSION OF CERTAIN TESTIMONY AT THE SENTENCING HEARING DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The determination of relevancy and admissibility of evidence is within the trial court's discretion. Tenn. Code Ann. § 39-2404(c). State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). See Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett v. Ohio, 438 U.S. 586, 604 (1978), this court held that the:

> "Eighth and Fourteenth Amendments require t
> the sentencer, in all but the rarest kinds
> capital cases, not be precluded from consi
> as a mitigating factor, any aspect of a de
> character or record and any of the circums
> the offense that the defendant proffers as
> for a sentence less than death." (court's

The court emphasizes, however, in a footnote to this
that "nothing in this opinion limits the traditional
of a court to exclude, as irrelevant, evidence not b
the defendant's character, prior record, or the circ
of his offense." Id. n.12.

In this case, petitioner sought admission o
on the "christian philosophy of death" and the deter
of capital punishment. Such testimony addresses the
question of whether death is an appropriate punishme
first degree murder. This societal question is appr
addressed by the legislature, not the individual jur
case. See Gregg v. Georgia, 428 U.S. 153, 186 (1976
not the individualized mitigating factors applicable
ticular defendant. Since the testimony sought to be
by petitioner does not bear on his character or prio
or the circumstances of the offense, the trial court
excluded this testimony as being irrelevant.

This allegation does not warrant the granti
certiorari. Houston v. State, 593 S.W.2d 267 (Tenn.
denied 449 U.S. 891 (1980).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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